No. 7765

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET B. BARRINGER and PHOENIX TITLE AND TRUST COMPANY, as Trustee,

Appellants,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt; SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation; CENTRAL ARIZONA LIGHT AND POWER COMPANY, a corporation; COUNTY OF MARICOPA, a political subdivision of the State of Arizona; STATE OF ARIZONA; JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona; W. R. WELLS; RAYMOND L. NIER; J. ALLEN WELLS; E. L. GROSE and MAUDE M. GROSE, his wife; GLEN E. WEAVER; LUCILLE NICHOLS; NELLIE B. WILKINSON; SUSIE M. WALLACE; E. R. FOUTZ; THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLEE, GEORGE E. LILLEY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WINDSOR SQUARE DEVELOPMENT, INC., A CORPORATION, BANKRUPT.

FILED

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THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

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Appellees.

BRIEF OF APPELLEE, GEORGE E. LILLEY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF WINDSOR SQUARE DEVELOPMENT, INC., A CORPORATION, BANKRUPT.

This is an appeal from the order of the United States District Court in and for the District of Arizona affirming the order of the Referee in Bankruptcy determining the amount and priority of liens and interests of *each of the*

respondents below in the proceedings before the Referee, in and to the property in possession of George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation.

Appellants specify seven assignments of error. We respectfully suggest to this Honorable Court that these do not form any basis for an appeal and do not state sufficient grounds to invoke the consideration of this Court for the reason that they do not comply with *Rule 11* of this Court or the general principles of equity governing such assignments. We present our argument thereon at pages 25-74 of this brief.

This appellee, George E. Lilley, Trustee in Bankruptcy, has filed herein motion to strike the statement of evidence, and motion to dismiss or affirm, upon grounds set up in said motions and authorities cited in support thereof, and again urges consideration of said motions, as well as an examination of appellants' Assigments of Error before passing on to a consideration of his argument and authorities upon the merits, as hereinafter set out.

Correction of and Additions to Appellants' Statement

Counsel for this appellee are submitting the following additional statement as covering matters either not stated at all or improperly stated in appellant's brief and which are deemed essential to a consideration of the issues on appeal.

The original schedules attached to the voluntary petition in bankruptcy scheduled the note signed by Thomas J. Tunney as an indebtedness of the bankrupt corporation and owing to Barringer in the sum of $74,170.60 and stated the payment thereof was assumed by the petitioner, and showed other unsecured claims in the sum of $60,013.06 and as assets real estate involved in this proceeding as belonging to the bankrupt (T. R. 569-571).

The order approving the Trustee's bond was recorded December 18, 1830 in Maricopa County Recorder's Office (T. R. 574), and the order of adjudication was also recorded on the 22nd day of November, 1930 (T. R. 571-572).

Amended schedules were filed by the bankrupt on December 15, 1930, showing unsecured claims of $47,453.78 (it will be noted that this is a reduction of claims from the first schedules filed) and also listed as the property of the bankrupt 182 lots in Windsor Square, all involved in this proceeding, together with twelve additional lots, all of an estimated value of $270,000.00 (T. R. 619-622).

The petition and original schedules were not made a part of the Referee's certificate on review, nor were they designated in the original praecipe of appellants. Long subsequent to the filing of this praecipe (T. R. 685), appellants on December 18, 1936, sent up and had made as a part of the printed transcript herein the petition and original schedules. Parts of both the original and amended schedules were introduced in evidence by this appellee and were briefly abstracted as exhibits (T. R. 619-622) but

appellants now incorrectly and erroneously state the contents of these amended schedules without having made them a part of the record and without having, in the way provided by the rules, afforded appellees an opportunity to have them included in the record.

On January 12, 1931, appraisers filed their appraisal appraising the total value of lots in Windsor Square, separately listed therein, at $136,819.50, with a total value of outstanding sale contracts on certain lots (all in Windsor Square) at $31,789.09 (T. R. 593-604).

April 25, 1931, appellant Barringer filed proof of claim in said estate, being Trustee Lilley's "Exhibit E" in Evidence (Tr. 163, 303, 577), setting forth as a basis thereof the Tunney note of $85,000.00 and purporting to claim a lien on lots involved in this proceeding by virtue of a so-called Declaration of Trust, said Barringer also petitioning the court therein that this property be sold for the purpose of satisfying her indebtedness, advances, interests, attorneys' fees and costs (T. R. 583).

The claim states that there are no set-offs or counterclaims to the debts and that "Margaret B. Barringer has not, nor has any person by her order or to her knowledge, or belief of said deponent for her use, *had or received any manner of security for said indebtedness whatever, SAVE AND EXCEPT the lien arising by virtue of the Declaration of Trust and amendments thereto hereinabove mentioned*" (T. R. 583). The claim was signed by Wm. H. McKay as "agent of said creditor" (T. R. 583).

Sometime thereafter objections to sale of the property were made by said Barringer (T. R. 584-6) and presented to the Referee, she claiming that she was the owner of a lien securing $85,000.00 upon the lots described *in the bankrupt's schedule of assets* and referring to the alleged "proof and claim of lien" theretofore filed by her in said proceedings; setting forth that if the property *should* be sold at a judicial sale, it was her right to use the indebtedness secured by her claimed lien in payment of the purchase money and "that until the amount of her said lien be judicially determined," the Referee was without authority to sell her security; and finally objecting to any sale pursuant to any order of sale *"which does not expressly authorize petitioner to bid thereat and in payment to apply the amount of her claim against the purchase price"* (T. R. 584-586).

On June 6, 1931, this appellee filed his petition to marshal leins and sell property free and clear of encumbrances (T. R. 168-175). He set up in said petition that claims were asserted by Barringer and the Phoenix Title & Trust Company in the property described in said petition (being all of the lots in Windsor Square involved in this proceeding) and also alleged that there were other claims of liens on said property by various other parties made defendants in said proceedings, being the appellants and the appellees herein, with the exception of Maude M. Grose and Windsor Square Development, Inc.

The prayer of the petition asked that the court make an order marshaling liens, determining the validity, amount

and priority of the liens and interests, and ordering the property sold at private sale free and clear of liens, and ordering all rights and interests in said property determined and transferred to the proceeds thereof, and for the issuance of an order to show cause requiring all named defendants to set up their alleged claim and rights therein at a time to be determined by the court.

There was no prayer on said petition that the claims of Barringer and the title company be adjudged void as stated by appellant on page 2 of brief. Upon the filing of said petition, a meeting of creditors was called after due notice, for June 18, 1931, to consider said petition (T. R. 175). At said meeting of which counsel for Barringer had due notice (T. R. 615), an order was made by the court which was filed on June 29, 1931 (T. R. 162) directing the sale of said property free and clear of incumbrances and directing all liens to be transferred to the proceeds of said sale. *No review of this order of sale was ever taken by appellants herein, or anyone else.*

The statement on pages 2 and 3 of appellant's brief that the Trust Company answered the petition showing that Barringer owned the subdivided tract is incorrect. On the contrary that answer set up that appellant Barringer entered *into an agreement with Thomas J. Tunney acting as agent on behalf of L. D. Owens, Jr., H. C. Dinmore and S. W. Mills, by which she agreed to sell the whole of said premises for a consideration of $105,000.00*; that $20,000.00 was paid in cash to appellant Barringer and that the

balance was to be paid to appellant Barringer with interest from December 20, 1928 (T. R. 325); that answer also set up that $85,000.00 was to be paid out of the receipts of the subdivision and sale of lots of said premises (T. R. 325) and that it was agreed by and between the seller and purchasers, Tunney acting as agent for the purchasers, that a warranty deed should be made by appellant Barringer to the Phoenix Title & Trust Company who would manage and handle the property (T. R. 326).

November 25, 1931, the Trustee in Bankruptcy filed objection to Barringer's proof of debt filed herein on April 25, 1931 (T. R. 163). Subsequently an offer was made by counsel for Trustee in Bankruptcy to allow Barringer to amend her claim, the same to be in compliance with the Bankruptcy Act and General Orders of the Supreme Court, and to show an unsecured debt, and further offered "that the Trustee will not oppose the allowance of such unsecured claim for such amount as the court may find due thereon." (T. R. 678)

The hearing on the Trustee's petition to marshal liens commenced on November 25, 1931 and ended December 18, 1931. At the close of the evidence it was agreed between the parties, and the referee so made his order, that the reporter's transcript should be filed and the matter submitted on briefs (T. R. 320-321). The brief of respondent Phoenix Title & Trust Company was filed on January 30, 1932 and that of respondent Barringer February 1, 1932. The brief of the Trustee was filed March 10,

1932 (T. R. 320-321). On March 22, 1932, the referee rendered his decision fixing and marshaling liens and determining priority thereof and notified counsel in case (T. R. 167-320).

Thereafter on April 12, 1932 the reporter's transcript was filed (T. R. 168). The statement on page 3 of appellants' brief that the Referee omitted the transcript of reporter's notes for the alleged reason that they were not timely filed is incorrect and misleading. They were not included in the record for the reason that they had no place in the record. Furthermore the delay in filing the transcript was due to the action of appellant who wished the reporter's transcript filed before he prepared and filed his brief (T. R. 320), but as the record shows he did not file same until after he had lost the case.

The referee entered his order on September 17, 1932 (T. R. 168, 231-253).

The statement in appellants' brief, page 3, that it was five months since the filing of the reporter's transcript that the referee's order was entered is incomplete and misleading, for the reason that he does not state that the delay was for the accommodation of counsel for appellant in order that he might have his vacation and return before the entry of the order, and that stipulation was entered into by counsel that the entry of such order and decree might be deferred to a date subsequent to September 15, 1932, subject to the approval of the court (T. R. 168, 321).

It affirmatively appears in the Transcript of Record that the statement appearing on page 5 of appellants' brief that citation was served on all parties is erroneous. Indispensable parties were not served, as affirmatively appears in the record, namely J. Allen Wells and Glen E. Weaver (T. R. 821, 805), notwithstanding the order of the Referee which was affirmed by the District Court was in favor of each of said appellees and their rights would be affected by any decision on appeal.

Regarding appellants' "Explanatory Note" on page 5 of brief, the statement of evidence does not include all testimony, or pleadings introduced before the Referee or certified to by him and reviewed by the District Court. That statement also includes many inaccurate statements of matters which find no support in the record. As an instance there is omitted the Trustee's objections to the claim of Barringer (T. R. 163); nor is it pointed out in said statement of evidence that no order was made allowing or disallowing this claim. There is also omitted the stipulation and order of the Referee filed July 27, 1932 (T. R. 320) with respect to deferring the entry of the order and decree of the Referee.

The statement on page 4 that the review was heard on the record and that no evidence was adduced de novo is incorrect. No testimony was introduced, it is true, but there were numerous hearings, admissions of counsel, particularly for appellants, and stipulations made in open court which were doubtless preserved in the judge's notes,

(Equity Rule 46) but which do not appear in the transcript of record, for the reason that the statement of evidence was not settled by the trial judge and was not settled after notice and hearing to the attorneys for this appellee, as required by Equity Rule 75 and District Court Rule 38 and apparently none of the attorneys for the other appellees had any notice whatsoever in regard to the proposed settlement of the statement of evidence.

The claims filed in the bankrupt estate as shown by the amended schedules, were almost entirely to cover expenditures made in the improvement of the lands involved in this litigation and money borrowed therefor (T. R. 667, 669).

The title to the lands in question passed to the bankrupt corporation on or about June 4, 1930, by a conveyance from the purchasers (T. R. 507) which recited a good and valuable consideration and provided that all the obligations and liabilities in connection with said property should be assumed by the bankrupt corporation. This assignment was accepted by the appellant Phoenix Title & Trust Company as trustee under the so-called Declaration of Trust (T. R. 507).

The statement on page 8 of appellants' brief that this assignment was without consideration, is incorrect and unsupported by the evidence, as is also the statement made in the first paragraph of page 9 of appellants' brief (T. R. 523-525, 528-529, 531-535). This appellee also calls attention to the wholly imaginary statements shown on page 9

of appellants' brief as to the Windsor Square Development, Inc., reassigning "its color of right to Owens for the mere asking, glad to rid itself of any appearance of right under the naked assignment". It must be borne in mind in this connection that the appellant herein, the Phoenix Title & Trust Company, *accepted* these assignments as the trustee under the so-called Declaration of Trust and must have, therefore, participated in what appellants now complain of as fraudulent. Furthermore, in connection with the transactions by which these assignments were made to the Windsor Square Development, Inc., a corporation, it is shown by the evidence that Mr. Owens was acting upon the advice of Mr. John Gust, the attorney for appellant, the Phoenix Title & Trust Company (T. R. 526), and a claim was filed by Mr. Gust's firm for legal services (T. R. 670) rendered to said corporation up to October 24, 1930. This would seem to contradict appellants' statement that "the corporation never did a stroke of business".

BRIEF OF ARGUMENT

I.

The order of the District Court affirming the order of the Referee fixing and marshaling liens, determining priority thereof, and adjudging certain asserted liens and interests null and void as against appellee George E. Lilley, Trustee in Bankruptcy, and the other appellees in this proceeding, and as against the real estate of the bankrupt,

was correct and should be affirmed for the following reasons:

The instrument which was relied upon by appellant Margaret B. Barringer to establish a lien was and is void as to the Trustee in Bankruptcy and the other appelleees in this proceeding in that:

(a) The property described in the order and decree of the Referee affirmed by the District Court of Arizona was in the possession of the bankrupt prior to bankruptcy, and ever since said time has been and is now in the possession of appellee, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, Bankrupt; and under and by virtue of the 1910 amendment to the *Bankruptcy Act, Section* 47 (*U. S. Code* 1928, *Title* 11, *Ch.* 5, *Sec.* 75), the Trustee has all the powers of a creditor holding a lien thereon by legal or equitable proceedings.

> *Bailey v. Baker Ice M. Co.,* 60 L. ed. 275; 239 U. S. 265;
>
> *Remington on Bankruptcy, Vol.* 4, *Sec.* 1402.

(b) The exclusive jurisdiction to determine all questions of liens or title in regard to the property was in the Bankruptcy Court.

> *Isaacs v. Hobbs,* 282 U. S. 734; 75 L. ed. 645.

(c) The claim of appellant Barringer is based upon a promissory note executed by one Thomas Tunney and an unacknowledged and unrecorded instrument entitled

"Declaration of Trust", which recites that said instrument was to be foreclosed as a mortgage in the event of default in the payment of said note, said instrument not being susceptible of record for lack of acknowledgment, and under *Section* 969, *Revised Code of Arizona,* 1928, (*Section* 2080, *Revised Statutes of Arizona,* 1913,) is void as to creditors, innocent purchasers, and said Trustee in Bankruptcy.

Reid v. Kleyenstauber, 7 Ariz. 58; 60 Pac. 879;

Murphey v. Brown, 12 Ariz. 268; 100 Pac. 803;

Keith v. Aztec Land & Cattle Co., 21 Ariz. 634; 193 Pac. 535;

Phoenix Title and Trust Co. v. Old Dominion Company, 31 Ariz. 324; 253 Pac. 435;

Neslin v. Wells Fargo, 104 U. S. 428; 26 L. ed. 803;

Sec. 974, *R. S.* 1928 *Sec.* 757, *R. S.* '01, *Sec.* 2088, *R. S.* '13).

(d) Stating the rights of appellant Barringer most strongly in her favor, said instrument could only be construed as a contract to give a lien and would only become effective as a lien against the Trustee in Bankruptcy, creditors of the bankrupt corporation, and innocent purchasers, from the date of a court decree establishing it as a lien.

Murphey v. Brown, supra;

Reid v. Kleyenstauber, supra.

(e) The construction of a contract is not to be found in its name, but in the ruling intention of the parties gathered from the language they have used. The instrument though called a "Declaration of Trust" was intended by the parties to be a mortgage and states therein that it was to be foreclosed as a mortgage and it was in fact an equitable mortgage, good as between the parties, and by its terms recognized title in the predecessors in interest of the bankrupt.

Herryford v. Davis, 26 L. ed. 160; 102 U. S. 235;

Van Winkle & Co. v. Crowell, 146 U. S. 42; 36 L. ed. 880;

Stephen v. Patterson, 21 Ariz. 308; 188 Pac. 131;

Crunden-Martin Mfg. Co. v. Christy, 22 Ariz. 254; 196 Pac. 454;

Mitan v. Roddan, 84 Pac. 145 (Calif.).

(f) The said unacknowledged and unrecorded instrument is good as between the parties as an equitable mortgage but void as to creditors, innocent purchasers, and the Trustee in Bankruptcy in possession of the property covered by said equitable mortgage and holding all the rights of a creditor having a lien by reason of legal or equitable proceedings.

Murphey v. Brown, supra;

Sparks v. Douglas & Sparks Realty Co., 19 Ariz. 123; 166 Pac. 285.

(g) One who conveys property by a warranty deed for a valuable consideration thereby disclaims any further interest in the property and cannot thereafter set up either title or trust against the terms of his deed when the deed is not obtained by means of fraud.

As a result of the payment of said purchase money the purchasers became the beneficial owners of the lands that are the subject of this litigation, and the appellant Phoenix Title & Trust Company became their trustee in an instrument in writing executed by each of the appellants. This trust was recognized by them in writing and the predecessors in interest of the bankrupt was recognized as the sole beneficiary of the trust.

Kennard v. Mabry, 78 Texas 151; 14 S. W. 272;

Walrath v. Roberts, 23 Fed. (2) 32 (9 C. C. A.);

Tillaux v. Tillaux, 115 Cal. 663; 47 Pac. 691.

(h) A resulting trust arose in favor of the purchasers of said lands, the full consideration therefor having been paid, although for convenience the title was taken in the name of another, the Phoenix Title and Trust Company, who acknowledged in writing that the purchasers were the sole beneficiaries under the trust thereby created.

Ducie v. Ford, 138 U. S. 587; 34 L. ed. 1091;

Bibb v. Hunter, 79 Ala. 351;

Neill v. Keese, 5 Tex. 23; 51 A. D. 746;

Perry on Trusts, Vol. 1, *Secs.* 25 *and* 124;

Smithsonian Institution v. Meech, 169 U. S. 397; 42 L. ed. 793;

In re Davis, 112, Fed. 129.

(i) Consideration is sufficient to create a resulting trust in favor of purchaser of lands when he pays part in cash and gives a negotiable promissory note secured by a mortgage for the balance of the purchase money.

Bibb v. Hunter, supra, citing

2 *Pom. Eq. Jur., Sec.* 1037.

(j) Under the laws of Arizona a purchaser becomes the owner of the property sold, although the legal title remains in the vendor.

Strahan v. Haynes, 33 Ariz. 128; 262 Pac. 995.

(k) No vendor's lien exists in Arizona in favor of a vendor who has parted with his property.

Appellant Barringer sold the lands known as "Windsor Square" to Owens, Dinmore and Mills, predecessors in interest of the bankrupt, who paid the consideration therefor and conveyed the lands to the appellant Phoenix Title & Trust Company who held them as trustee for the purchasers and afterwards for the bankrupt corporation.

Baker v. Fleming, 6 Ariz. 418; 59 Pac. 101.

(l) The property of the bankrupt being held by equitable title was subject to levy, execution and sale under legal process against the debtor, and therefore the title

to such lands passed to the trustee in bankruptcy upon the filing of the bankruptcy petition and subsequent adjudication.

Oliver v. Dougherty, 8 Ariz. 65; 68 Pac. 553;

Jarvis v. Chanslor & Lyon Co., 20 Ariz. 134; 177 Pac. 27;

White v. Stump, 266 U. S. 310; 69 L. ed. 301;

Bankruptcy Act, Sec. 70*a* (*Subd.* 4); *U. S. Code, Sec.* 110, *Title* 11, *Ch.* 7.

(m) The statutes of Arizona designate certain books for the recordation of instruments of the nature of the so-called "Declaration of Trust" and if said instrument had been recorded in such books it would have imparted constructive notice to creditors, purchasers and the Trustee in Bankruptcy.

Sections 2588, 2589, 2590, *Revised Statutes of Arizona,* 1913;

Stephen v. Patterson, supra.

(n) Possession is equivalent to record, and the fact that the title of the bankrupt or its predecessors in interest was not of record would not affect the right of the Trustee in Bankruptcy to have the unrecorded and unacknowledged instrument declared void, as possession of the land by the bankrupt corporation was prima facie evidence of title; therefore the instrument upon which appellants rely is void as to the trustee in bankruptcy under *Section* 969,

Revised Code of Arizona, 1928 (Section 2080, Revised Statutes of Arizona, 1913).

Keith v. Aztec Land & Cattle Co., supra;

Vreeland v. Claflin, 24 N. J. Eq. 313;

Cady v. Purser, 131 Cal. 552; 63 Pac. 844.

(o) When the holder of an instrument capable of enforcement as a lien takes legal proceedings to enforce such lien, he cannot thereafter claim title under such instrument.

Van Winkle v. Crowell, supra.

(p) Statutes of Arizona provide that deeds of trust shall be considered as mortgages and foreclosed as mortgages and also provide that all deeds of trust, mortgages, or other instruments in writing intended to create liens shall be recorded in books separate from those in which deeds and other conveyances are recorded. When not so recorded such instruments are void as to creditors.

Sections 854, 2309, 2312, 849 *and* 850 *Revised Code of Arizona*, 1928;

Neslin v. Wells Fargo Co., supra;

Drake v. Reggel, 37 Pac. 583 (Utah)

James v. Morey, 2 Cowen (N. Y.) 246; 14 Am. Dec. 475;

Cady v. Purser, supra;

Kent v. Williams, 146 Cal. 3; 79 Pac. 527;

Stephens v. Patterson, supra;

Bayley v. Greenleaf, 5 L. ed. 393;

Manufacturers & Merchants Bank v. Bank of Penn. 42 Am. Dec. 240;

Stephen v. Sherod (Tex.), 55 Am. Dec. 775;

Friedley v. Hamilton, 17 A. D. 638.

(q) The title conveyed to the trustee by the filing of the petition in bankruptcy and subsequent adjudication is as complete and effective as if a sale were made by a sheriff or special master and is effective as of the date of the filing of the petition in bankruptcy.

In re Britania Mining Co., 203 Fed. 450 (7 C. C. A.);

White v. Stump, supra.

(r) When a purchaser who pays the consideration for property purchased, causes the conveyance thereof to be made without consideration to another, and at the time of making such conveyance intends to engage in an enterprise and incur debts beyond his ability to pay, such a conveyance is fraudulent as to creditors, present and prospective, under the provisions of the Uniform Fraudulent Conveyance Act as adopted by the State of Arizona, and upon subsequent bankruptcy the title to the property vests in the trustee in bankruptcy.

Sec. 1525, *et seq. Revised Code of Arizona*, 1928;

Chapter 131, *Session Laws of Arizona*, 1919;

Bankruptcy Act, Sec. 70*a*, (*Subd.* 4); *U. S. Code; Sec.* 110; *Title* 11; *Ch.* 7;

Wood v. U. S., 10 L. ed. 987; 16 Pet. 342.

II

The conduct of appellants in failing to record their equitable mortgage and keeping silent when it was their duty to speak and inquiry was made of them, constitutes such estoppel as requires that the order appealed from be affirmed.

(a) Failure of appellant Barringer to record her equitable mortgage, coupled with silence when inquiry was made as to ownership of the lands, when there was a duty to speak, is actually "practiced deceit", and when creditors or innocent purchasers are injured thereby creates an estoppel in their favor.

Ash v. Honig, 62 Fed. (2) 793 (2 C. C. A.);
Kirk v. Hamilton, 102 U. S. 68; 26 L. ed. 79;
Dickerson v. Cosgrove, 100 U. S. 578; 25 L. ed. 618.

(b) Estoppel in pais need not be pleaded.

Shelton v. Southern Ry. Co., 255 Fed 182;
In re International Mineral Co., 222 Fed. 415 (citing numerous cases).

(c) When a party fails to object to evidence establishing estoppel he waives any objection that estoppel was not pleaded and when he introduces testimony the effect of which is to establish estoppel he thereby waives any objection to a failure to plead it.

Lusk v. Bush, 199 Fed. 369 (9 C. C. A.)

(d) There as no requirement that estoppel be pleaded where there is no opportunity to plead it.

Shelton v. Southern Ry. Co., supra.

III

Appellants have failed to state a case requiring a reversal of the order of the District Court, or any consideration by this Court on appeal.

1. Appellants' Assignments of Error fail to advise the court of the questions it is called upon to decide without going beyond the assignments themselves, and present no question for review on this appeal. Appellants' assignments of error do not comply with *Rule* 11 of this Court, and are based as follows:

(a) Upon findings of the Referee, the errors complained of not being pointed out with particularity as required by *Rule* 11 of this Court, or the principles of equity governing assignments of error, and not having pointed out wherein the order of the District Court appealed from as distinguished from the findings of the Referee is erroneous in whole or in any particular. (*Assignments of Errors Nos. IV, V, XIII, XIV, XV*).

Andrews v. National Foundry & Machine Works, 46 U. S. Appeals, 281; 36 L. R. A. 139.

(b) Upon evidence as shown by the Reporter's Transcript, whereas no reporter's transcript is a part of this record, either in the court below, or in this Court. (*Assignment of Error No. IV*).

Crim et al v. Woodford, 136 Fed 34;

In re Taft, 133 Fed 511;

In re Hays, 181 Fed. 674.

(c) That "the whole bankruptcy proceedings were fraudulent and void", no foundation for such assignment having been laid in appellants' petition to review the Referee's order, and being a collateral attack upon the order of adjudication made by the District Court (*Assignment of Error XVII*).

> *Fairbanks Steam Shovel Co. v. Wills,* 240 U. S. 642; 60 L. ed.. 841;
>
> *New Lamp Chimney Co. v. Ansona Brass* & *Copper Co.,* 91 U. S. 656; 23 L. ed. 336.

(d) That the Referee permitted witnesses to testify to certain evidence, such assignment not quoting the grounds urged at the trial for the objection and the exception taken and the full substance of the evidence admitted, and such assignment not being assigned as a ground of error in appellants' petition to review the order of the Referee (*Assignment of Error No. XVIII*).

> *Schaeffer v. Casey,* 77 Fed. (2) 80 (............ C. C. A.)

(e) Upon an alleged finding that does not appear in the record and was never made by the Referee or by the District Judge, nor can this assignment of error be based upon the ground that the court made its findings for an "insufficient" reason. (*Assignment of Error No. V*).

> *Andrews v. National Foundry* & *Machine Works,* supra.

2. Appellants have assigned no error whatsoever pointing out that the order appealed from is erroneous,

either in whole or in any particular, or that the order of the District Court appealed from is not supported by the evidence, or supported by proper findings of fact, and the assignments of error made by appellants standing alone are not sufficient to entitle said appellants to a review of the order of the District Court.

Rule 11, *Ninth Circuit Court of Appeals.*

3. No error is assigned to any ruling of the Referee or Judge upon the "proof of debt" filed by appellant Barringer, the Trustee in Bankruptcy having filed objections to the proof of debt, and as the asserted lien could only exist as an incident to a proven debt, no basis exists for this appeal.

Rule 11, *Ninth Circuit Court of Appeals.*

IV

This court cannot consider evidence on this appeal, for the reason:

1. No controversy in bankruptcy is involved.

2. The statement of evidence was not settled by the trial judge.

3. Appellees had neither notice nor opportunity to be heard upon the settlement of the evidence.

Sec. 25 *A of Bankruptcy Act;*

Coder v. Arts, 213 U. S. 223, 53 L. ed. 772;

Taylor v. Ross, 271 U. S. 176, 70 L. ed. 889; Federal Equity Rule 46;

Federal Equity Rule 75.

APPELLEE'S CONTENTIONS

The appellee makes two separte and independent contentions, either of which if sound, will require the affirmance of the Order of the District Court regardless of the validity of the other:

First: An instrument in writing intended to secure the payment of a debt and to create a lien upon lands, which is neither acknowledged nor recorded, is void as to creditors, innocent purchasers, and the trustee in bankruptcy of the debtor in possession of the lands upon which the claim of lien is asserted, under the statutes of Arizona and the 1910 amendment to the Bankruptcy Act.

Second: One who withholds from the record a mortgage or other instrument executed for the purpose of securing a debt and at the same time places the debtor in possession of the property knowing that the debtor is holding himself out as owner, and who upon inquiry by prospective creditors and purchasers fails to disclose that he claims a lien by virtue of such unrecorded instrument, is guilty of fraud upon such creditors and purchasers and is estopped from claiming the existence of any such lien as against creditors of the debtor, innocent purchasers from the debtor and subsequent trustee in bankruptcy of the debtor, who is in possession of the lands.

ARGUMENT

I

Possession by Bankrupt and Its Trustee

The property described in the decree appealed from was at and before the time of the institution of the bankruptcy proceding, in the open, notorious possession of the bankrupt who claimed it as owner and exercised all the rights of an owner in connection therewith, and it was at all times subsequent to bankruptcy in the possession of this appellee, as appears by clear and undisputed evidence in the record.

On pages 653-659 of the Transcript of Record appears the testimony of Mr. Lilley as to his care of the property and the expenditures therefor and improvements thereon, including payments to the caretaker Mr. Schraeder, repairs to water line, the power account for operating the water system upon the property and for watering the trees and shrubs in the parkways of Windsor Square, including the lots in litigation. He testified that "Mr. Schraeder was in my employ as Trustee in Bankruptcy of the Windsor Square property" (T. R. 656).

> "The possession that I have taken there was under an order of court to act as trustee to administer the estate of the Bankrupt" (T. R. 660).
>
> "I have been in possession of the property the same as I have been in possession of any other property that I have charge of or own" (T. R. 661).

That the property in question was in the actual possession of the bankrupt corporation and its predecessors in interest appears from the testimony of many witnesses.

Thomas Maddock, the engineer in charge of the improvements upon the property, testified as to the detail of the expenses made in sinking the well upon the property, installing the pipe line system, putting in pavement, sidewalks, curbs, electric light standards, etc. and that Mr. Owens harvested a voluntary crop of hay that came up upon the premises (T. R. 309-310).

That Mr. Owens, predecessor in interest of the bankrupt, was in actual physical possession of the property and claiming the same as owner appears in the testimony of Henry F. Lieber (T. R. 311-313). Mr. W. H. Norman, Jr., testified that Mr. Owens was on the premises overseeing things on the tract at the time that he did work thereon for the Norman Nursery Company (T. R. 313-314). Mr. Lilley also testified that during all the time that he had been Trustee in Bankruptcy of the estate no one had questioned his (Lilley's) possession (T. R. 317).

That the predecessors in interest of the bankrupt were lawfully in possession of the property and placed thereon by appellant Barringer appears from the so-called "Declaration of Trust" (T. R. 425-431), and that such was the intention of the parties also appears from the provision in their agreement that appellant Barringer should be entitled to the appointment of a receiver without bond to take possession of the premises and collect the rents and profits

thereof up to the time of redemption or issuance of sheriff's deed in case of a foreclosure of her lien (T. R. 441-442).

The exclusive jurisdiction, therefore, to determine all questions of liens or title in regard to this property was in the Bankruptcy Court.

Isaacs v. Hobbs, 282 U. S. 734, 75 L. Ed. 645.

As this appellee has possession of the property he has under the provision of the 1910 Amendment to *Section 47a of the Bankruptcy Act, Title 11, Chapter 5, Sec. 75, U. S. Code 1928,* all the rights of a creditor holding a lien by legal or equitable proceedings. This gives the Trustee in Bankruptcy a three-fold title, which is clearly described in *Remington on Bankruptcy,* Vol. 4, Sec. 1402, et seq. He has therefore, all the rights of a lien-holding creditor as to the property which is subject of this litigation.

Bailey v. Baker Ice M. Co., 60 L. Ed. 275; 239 U. S. 265.

The Statutes of Arizona Provide that Unrecorded Liens Are Void as to Creditors

The instrument upon which apellants base their claim that appellant Barringer had a lien appears in the Transcript of Record pages 419-492. This instrument was never acknowledged so as to entitle it to recordation. It is also admitted in the pleadings of appellant Barringer that the instrument was never recorded (T. R. 196).

The instrument purports to create a lien to secure the payment of the negotiable promissory note set up therein in haec verba (T. R. 424-425). It is insufficient as a legal mortgage, among other reasons, because it is not acknowledged. It does create a contract to give a lien or is an equitable mortgage that would be binding between the original parties or others who had notice thereof, but not having been recorded under the laws of Arizona *Section* 969, *Revised Code of Arizona,* 1928 (Sec. 2080, Revised Statutes of Arizona, 1913) (See App. p. iii) is invalid as against all of the appellees in this proceeding.

It has been the settled policy of Arizona since the year 1887 that unrecorded instruments purporting to be liens upon property for the purpose of securing a debt are void as against creditors and innocent purchasers. This statute has been interpreted by the Supreme Court of Arizona in numerous instances and readopted in the Codes of 1901, 1913, 1928 (effective July 1, 1929) and the decisions of the Supreme Court of Arizona specifically point out that such instruments can be made valid liens good as against creditors by having them established as such *but these decisions also point out that when so established they become effective as against such creditors and purchasers only from the time that they have been established by the decree of a competent court.*

The statute fist appears as *Section* 2601 of the *Arizona Code of* 1887.

That such an unrecorded lien is invalid as against creditors has been decided in the following cases:

Keith v. Aztec Land & Cattle Co., 21 Ariz. 634; 193 Pac. 535;
Phoenix Title & Trust Co. v. Old Dominion Company, 31 Ariz. 324; 253 Pac 435;
Neslin v. Wells Fargo, 104 U. S. 428; 26 L. Ed. 802.

This statute was interpreted in the case of *Reid v. Kleyenstauber*, 7 Ariz. 58 (1900); 60 Pac. 879, and subsequently adopted with this interpretation (Civil Codes of Arizona, 1901, 1913, 1928).

This case is practically on all fours with the case at bar, the only difference between the two being that the instant case is a proceeding by a trustee in bankruptcy with the right of a creditor holding a lien by legal or equitable proceeding, while the *Reid v. Kleyenstauber* case was one of a creditor who had obtained a lien by virtue of a judgment. The mortgagee in that case occupied a stronger position than the appellant Barringer, for he had recorded his mortgage, but there was a defective certificate of acknowledgment and the Court held that the recording being insufficient, there was no constructive notice and that therefore, the rights of the judgment creditor were superior to those of the mortgagee.

In this case the holder of the instrument, which was a mortgage on real estate, brought an action to have the certificate of acknowledgment amended and at the same time to foreclose the mortgage.

In the meantime a creditor had acquired a lien by means of a judgment. He had no notice of the existence of the mortgage except such as might be imparted by the recording of the defectively acknowledged instrument. The court in its decision held that the instrument could be corrected in that proceedings but held that "the decree of the court correcting such certificate is not to be retroactive in its effect, so as to give the instrument force and effect as notice from the time it may have been filed for record, but only from the time when it shall be reformed", and held that the lien acquired by the third person subsequent to the execution and recording of the instrument and the reformation of the defective certificate of acknowledgment was superior to that of the mortgage as corrected by the decree.

In the case of *Murphey v. Brown,* 12 Ariz. 268, 100 Pac. 803, the court had before it the question of priority between the unrecorded lien created by an unrecorded lease as against an innocent purchaser for value. In its opinion the Supreme Court of Arizona quoted with approval the case of *Reid v. Kleyenstauber,* supra. The lease was not acknowledged by either Murphey or Brown. The court held that the lease was not effective as a lease because it was not acknowledged, but held that the instrument was sufficient as a contract for a lease. The court also held that "if Friedman purchased the stock of merchandise with notice of Murphey's equities, Murphey is entitled to enforce, as against Friedman, his equitable right to a lien."

That an instrument executed for the purpose of securing a debt may be valid between the parties, though not properly executed or recorded, but is void as against creditors and innocent purchasers was held in the case of *Murphey v. Brown*, supra

Appellant Barringer's lien could only be effective from the date on which she obtained a court decree establishing it as a lien.

> *Sec. 974,* Revised Statutes of Arizona 1928, (Sec.757, R. S. '01, Sec. 2088 R. S. '13) (Ap. p. iii);
> *Murphey v. Brown,* supra;
> *Reid v. Kleyenstauber,* supra.

The Construction of a Contract Is Determined by the Contents of the Instrument, Not by Its Name.

The principle is well established that an instrument is to be construed according to the language of the instrument as a whole, and not by any name which may be applied to it. The instrument upon which appellant Barringer depends is entitled "Declaration of Trust," but an examination of its contents shows that the intention of the parties was to create a mortgage and if the instrument had been properly acknowledged it would have been sufficient as a mortgage, though not in the usual form in which a mortgage is written.

The instrument sets up a debt evidenced by the promissory note set up therein in haec verba (T. R. 424-425) ; it purports to create a lien upon the lands described therein by express language (T. R. 425) ; it provides that the lien shall be foreclosed as mortgages are foreclosed (T. R. 441-442) ; it recognizes the debtor's right of redemption and gives to the mortgagee the right to the appointment of a receiver upon foreclosure to hold the property and collect the rents and profits thereof until the property shall be redeemed from a sheriff's sale or a sheriff's deed be issued to the purchaser at sheriff's sale (T. R. 442) ; it provides for attorney's fees upon foreclosure (T. R. 442). All of these recitals in the instrument are inconsistent with any claim of lien otherwise than by mortgage.

In addition thereto, it is provided therein that extensive improvements shall be made upon the property by the purchasers (T. R. 431-432). These improvements were actually made involving an autlay in excess of $90,000.00 (T. R. 309-310). It was contemplated that the promissory note should be paid from the proceeds of the sale (T. R. 325) ; the instrument provided that the property should be sold in lots and the sale price for the contract should aggregate $250,000.00 (T. R. 435). The purchasers were placed in actual possession of the lands, made improvements, sold lots, held themselves out to the public as owners.

We think no other construction could be placed on said instrument by the parties other than that it was an

equitable mortgage. Such a construction is binding if there is any ambiguity in the terms of the instrument.

> *Crunden-Martin Mfg. Co. v. Christy,* 22 Ariz. 254; 196 Pac. 454;
> *Mitau v. Roddan,* 84 Pac. 145 (Calif).

Similar instruments have been construed by many courts, including the Supreme Court of the United States, as creating equitable mortgages even where they specifically provide that title shall be retained by the vendor. A leading case is that of *Herryford v. Davis,* 26 L. Ed. 160; 102 U. S. 235 (See App. p. x, xi).

In the case of *Van Winkle & Co. v. Crowell,* 146 U. S. 42; 36 L. ed 880, the court had before it an instrument in the form of a promissory note, which contained the following recital:

> "The above is for purchase money of one cotton seed oil mill machinery built at Mitchell's Station, Ala. which E. Van Winkle & Co. have this day agreed to sell to Messrs, Belser & Parker, of Pike Road, Ala.; and it is the express condition of the delivering of the said property that the title to the same does not pass from E. Van Winkle & Co. until the purchase money and interest is paid in full."

The plaintiff did not record his instrument.

The court there held that the title passed to the purchaser and that the instrument was a mortgage and was void against a subsequent mortgagee who recorded his

mortgage within the time permitted by the laws of Alabama, that being the state where the contract was entered into.

The court was aided in its interpretation of the instrument involved by the fact that the vendor filed a mechanic's lien against the machinery that was the subject of the litigation and commenced a suit in a court of the state of Alabama to enforce that lien, but subsequently dismissed the same without a trial on the merits. The court held that by this election, as well as by the terms of their contract they were barred from claiming that the instrument was other than a mortgage.

It will be noted that appellant Barringer took similar action to enforce her "lien" when she filed a proof of claim in bankruptcy and asserted her lien as an incident to her debt (T. R. 577).

In the case of *Stephen v. Patterson*, 21 Ariz. 308; 188 Pac. 131, the court had under construction an instrument which as to legal effect is very much the same as the one involved in this litigation. In the court's opinion holding that the instrument was an equitable mortgage, the court used the following language:

> "We recognize the well-settled and familiar principle in equity that where it is clearly shown that the intention of the parties to a transaction is to give a security for a debt or obligation upon some particular property, however informally such intention may be

> expressed, equity will in an appropriate proceeding declare an equity mortgage or lien to exist, and by its decree enforce the same as against such property in satisfaction of the debt or obligation,"

and quoted freely from standard authorities. In that case the instrument was properly acknowledged and was recorded in Book 14 of Miscellaneous Records of Maricopa County, and the court held that the instrument was good as a lien against third parties by reason of the fact that it was recorded in the proper book for the recording of an equitable mortgage, and that when so recorded it was sufficient to impart constructive notice of the lien to subsequent purchasers and encumbrances. The case is important, not only as defining what is considered an equitable mortgage in Arizona, but as pointing out in which book such instruments must be recorded in order to make them valid against subsequent purchasers and encumbrances and what is necessary to constitute constructive notice to such parties of such instrument.

When the Holder of an Instrument Capable of Enforcement as a Lien Takes Legal Proceedings to Enforce Such Lien, He Cannot Thereafter Claim Title Under Such Instrument.

Appellant Barringer filed a proof of debt in the bankruptcy proceedings asserting a lien as incident to the debt, and also filed a demand that the Bankruptcy Court determined the validity and extent of her lien prior to a sale

of the property (T. R. 584-586). She thus invoked a proceeding that was equivalent of the foreclosure of a mortgage and thereby elected to treat the instrument she held as a mortgage. The proceedings she took were ample to protect her rights if she had any. Therefore there was an election of remedies. Practically this identical question was decided by the Supreme Court of the United States in *Van Winkle* n *Co. v. Crowell,* supra.

We believe that the election of remedies was as complete in the instant case as it was in the case of *Van Winkle & Co. v. Crowell,* and therefore it is settled that appellant Barringer must rely upon her asserted lien and not upon any claim of title.

The Grantor in a Warranty Deed Disclaims Any Interest in the Land and Cannot Thereafter Set Up Either Title or Trust Against the Terms of His Deed.

Appellant Barringer was the grantor in the warranty deed to the Phoenix Title & Trust Company who took title for the purchasers as a matter of convenience.

The predecessors in interest of the bankrupt furnished all the consideration for the purchase of the property and the grantee in the deed furnished none (T. R. 446, 432). This was admitted in writing by each of the appellants in the case (T. R. 423-424). They also admitted in writing that the sole beneficial interest in the property was in the

purchasers (T. R. 433-434). The evidence discloses that the dummy Tunney was merely the paid agent of the purchasers (T. R. 466). The deed of the appellant Barringer to appellant Phoenix Title & Trust Company vested the legal title in the latter corporation (T. R. 419). This latter corporation having admitted that it was the grantee without consideration except as paid by the beneficiary, is, of course, estopped to deny that it is holding the same for the benefit of this recognized beneficiary or to deny that a resulting trust was the result of the transaction.

By executing the said warranty deed to the Phoenix Title & Trust Company, appellant Barringer disclaimed all interest in the property.

Kennard v. Mabry, 78 Tex. 151; 14 S. W. 272.

It could not establish a resulting trust in its own favor against the terms of its deed. The rule has been clearly laid down by this Honorable Court in the case of *Walrath v. Roberts,* 23 Fed. (2) 32, where the direct question at issue was, could a resulting trust be established in favor of the grantor in a deed in opposition to the express terms of the conveyance? The court held that in the absence of fraud, recitals in the deed are conclusive on the grantor and no resulting trust could be raised in favor of the grantor in opposition to the express terms of the conveyance. This Court said: "Even if they were executed without consideration they would have no such effect," and also said:

"On the other hand, if there was a consideration in fact, or if there was even an acknowledgment of the receipt of a nominal consideration in the deeds, there was no resulting trust."

This Honorable Court quoted with approval from the case of *Tillaux v. Tillaux,* 115 Cal. 663, 47 Pac. 691) (See App. p. vii, viii).

A Resulting Trust Arose in Favor of the Purchasers from the Payment of the Consideration by Them.

The payment of the purchase price of lands by a purchaser and conveyance taken in the name of another party who does not contribute to the consideration, but takes title for convenience or some other reason creates a resulting trust in favor of the purchaser and subjects the land to the debts of the purchaser.

The consideration that passed to appellant Barringer consisted of cash in the sum of $20,000.00 (T. R. 466), accompanied by a promissory note secured by a mortgage upon the property conveyed. (T. R. 466). In addition thereto the purchasers deposited $40,000.00 to be spent in improvements upon the property (T. R. 466). The result was that appellant Barringer agreed to receive and did receive the full consideration for the tract sold to the predecessors in interest of the Bankrupt. The note was secured by an independent instrument good as between

the parties and the security, therefore, was of a value as fixed by a sum in excess of $195,000.00. Certainly a complete consideration and sufficient to raise a resulting trust in favor of the purchasers.

> *Bibb v. Hunter,* 79 Ala, 351, citing 2 *Pom. Eq. Jur. Sec.* 1037.

The instrument in question recited that the grantee in the deed, appellant Phoenix Title & Trust Company, paid no part of the consideration, but that the entire consideration was paid by the purchaser. It defined the purchaser as beneficiary and as being entitled to the entire beneficial interest in the property, and provided that the purchaser should go into possession and make extensive improvements. The vendor placed the purchasers in possession of them, and they remained in possession until June 4, 1930, when they conveyed the property to the bankrupt corporation for an adequate consideration.

The vendor intended that the predecessors in interest of the bankrupt should have possession of the property (T. R. 430-431). They actually placed them in possession (T. R. 605-614), and the predecessors in interest of the bankrupt immediately went into possession of the premsses as owners (T. R. 605-614), expended more than $90,000.00 in permanent improvements upon the lands (T. R. 737, They held themselves out to prosepective purchasers and prosepective creditors as owners of the land while in actual physical possession of the premises and at a time when parties they were dealing with were

upon the premises (T. R. 544-55-). They were permitted to have signs upon the property indicating that they were the owners thereof (T. R. 646), an dthat the Phoenix Title & Trust Company would guarantee the title thereof (T. R. 646); and upon inquiry of the grantee in the deed by a prospective creditor and by prospective purchasers no disclosure of any claimed interest of any kind in the property by appellant Barringer was disclosed to the inquirers. The grantee in the trust deed never had nor does not now claim any beneficial interest in the lands T. R. 323-337).

The rule that a trust results to him who pays the consideration for an estate where the title is taken in the name of another is tersely stated in *Ducie v. Ford,* 138 U. S. 587; 34 L. ed 1091.

These trusts can be proven by parol evidence and courts presume that a trust is intended for the person who pays the money.

> *Bibb v. Hunter,* supra;
> *Neill v. Keese,* 5 Tex. 23; 51 A. D. 746;
> *Perry on Trusts,* Vol. 1, Secs. 25 and 124.

Nor does the fact that an express trust was attempted to be created destroy this resulting trust.

> *Smithsonian Institution v. Meech,* 169 U. S. 397; 42 L. Ed. 793;
> *In re Davis,* 112 Fed. 129.

Since the title to the property was vested in the bankrupt as well as the possession, the same passed to the trustee immediately upon the filing of the petition in bankruptcy and it becomes apparent that the Phoenix Title & Trust Company holds only the naked legal title and that all the beneficial interest in the property is now vested in this appellee as Trustee in Bankruptcy who holds, in addition thereto, ,all the rights of a creditor holding a lien by legal or equitable proceedings.

Under the Laws of Arizona a Purchaser Becomes the Owner of the Property Sold, Although the Legal Title Remains in the Vendor.

Arizona has adopted the rule prevailing in equity that upon a sale of land, the vendee is looked upon and treated as the owner of the land and when the vendor retains the legal title he holds it as a naked trustee for the vendee to whom all the beneficial interest has passed.

Strahan v. Haynes, 33 Ariz. 128; 262 Pac. 995 (See App. p. ix):

The above case was one where there was only executory contract of sale, but we think that the principles are applicable in the instant case, and the rule prevailing in equity that the vendee becomes the owner even though he holds only an equitable title is too firmly established to be now questioned.

No Vendor's Lien Exists in Arizona in Favor of a Vendor Who Has Parted With His Property.

It has been the rule in Arizona at least since 1899 that no vendor's lien exists in favor of one who has conveyed title by deed, and that there is no implied equitable lien in his favor for the unpaid purchase money. The Supreme Court of Arizona in *Baker v. Fleming,* 6 Ariz. 418, 59 Pac. 101, so expressly held (See App. p. v, vi).

This rule is to be borne in mind when distinguishing cases from Texas where a contrary rule prevails.

The vendor, appellant Barringer, having parted with title to the property and deeded the same to the Phoenix Title & Trust Company who held the lands as trustee for the purchasers furnishing the consideration, under the rule above stated, could have no implied vendor's lien upon the lands so conveyed. Therefore from the moment she parted with title she had no further interest in the land and no lien thereon except such as was provided by her equitable mortgage, which as we have seen is void as against the appellees on this appeal

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The Property of the Bankrupt Being Held by Equitable Title Was Subject to Levy, Execution and Sale Under Legal Process Against the Debtor.

The entire beneficial interest in the lands involved in this proceeding vested in the predecessors in interest of the

bankrupt at the time of the purchase thereof. This is admitted by appellants (T. R. 433). Under the laws of Arizona such interest is subject to sale and levy and therefore passes to the trustee in bankruptcy upon adjudication. *Bankruptcy Act, Sec.* 70*a* (*Subd.* 4); *U. S. Code, Sec.* 110, *Title* 11, *Ch.* 7 (App. p. iv).

The rule is clearly laid down in *Oliver v. Dougherty,* 8 Ariz. 65; 68 Pac. 553 (See, App. p. viii). This rule was affirmed in *Jarvis v. Chanslor & Lyon Co.,* 20 Ariz. 134; 177 Pac. 27.

The case of *White v. Stump,* 266 U. S. 310; 69 L. Ed. 301, holds that from the date of the filing of the petition in bankruptcy the title vests in the trustee, and that thereafter the bankrupt cannot take any action that would affect the rights of the trustee.

This decision was followed by this Honorable Court in the case of *Georgouses v. Gillen,* 24 Fed. (2) 292, an Arizona case.

The order of adjudication vested the title to the lands in litigation in the Trustee in Bankruptcy as effectively as if a sale were made by a sheriff or special master.

In the case of *In re Britania Mining Co.,* 203 Fed. 450 (7 C. C. A.), the Court in speaking of the Bankruptcy Statute held:

> "In short, the statute operates as a self-executing conveyance from the bankrupt to the trustee. His quality of title is the same as if the statute, instead

> of operating directly, had required that the court should either cause the bankrupt to convey to the trustee or should appoint a commissioner to execute a conveyance in the bankrupt's name."

It quotes the applicable provisions of the Bankruptcy Act and General Orders in Bankruptcy.

As the case of *Reid v. Kleyenstauber,* supra, was a case where a sale was by the sheriff, we consider that this interpretation of the bankruptcy law brings the instant case within the terms of that case.

Deeds of Trust to Secure Debts Are Mortgages and Void as to Bona Fide Purchasers and Encumbrancers When Not Recorded in Proper Books Under the Laws of Arizona.

Some attempt has been made by the appellants to treat the deed from appellant Barringer to appellant Phoenix Title & Trust Company as a deed of trust to secure a debt. While this contention is far fetched in that such a deed of trust would have to be executed by the owner of the equitable title under the laws of Arizona, the instrument, even if a deed of trust for such a purpose, would be void as to all of the appellees herein for the reason that it is recorded in the Book of Deeds and not in the book designated for that purpose by the laws of Arizona.

Section 854 *of the Revised Code of Arizona,* 1928, (*Sec.* 2595, *R. S.* '13) reads as follows:

> "Instruments Creating Liens to be Recorded Separately: All deeds of trust, mortgages, or other instruments of writing intended to create a lien, shall be recorded in a book separate from those in which deeds or other conveyances are recorded."

And *Sections* 849 *and* 850, *Revised Code of Arizona*, 1928, (*Sec.* 2590, *R. S.* '13, *Sec.* 2589, *R. S.* '13) (See App. p.ii), cover the requirements of the statute with respect to the books in which various instruments shall be recorded and the indices which are required to be kept therefor. Under the laws of Arizona, therefore, the indices are a necessary part of the record. Unless deeds of trust, mortgages or instruments in writing, intended to create a lien are recorded in *books separate from those in which deeds or other conveyances are recorded*, they are not constructive notice to anyone, and an instrument so recorded is invalid as against a creditor and consequently against a trustee in bankruptcy.

These statutes, and others of like tenor, were in the Revised Statutes of Arizona, 1913, and all were brought forward into the Civil Code of Arizona, 1928. Before the adoption of the 1928 Code, these statutes as they appeared in the 1913 Code were construed by the Supreme Court of Arizona in *Stephen v. Patterson*, supra, where the court held that instruments must be recorded in books designated by the statutes and if not so recorded do not impart constructive notice. The case of *Cady v. Purser*, 131 Cal. 552, 63 Pac. 844, is cited with approval in that case, as is

also the case of *Kent et al v. Williams et al,* 146 Cal. 3, 79 Pac. 527, where the proper books for the recording of such instruments in California is pointed out. In the *Stephen v. Patterson* case the Supreme Court of Arizona pointed out the corresponding book in Arizona to the one pointed out by the California statute. The book in California is entitled "Covenants" and in Arizona it is entitled "Miscellaneous".

In states having statutes similar to ours, the interpretation placed upon such statutes is the same as that placed upon the Arizona statutes in the case of *Stephen v. Patterson,* supra.

The case of *Neslin v. Wells Fargo,* 26 L. Ed. 802; 104 U. S. 428, is an interpretation by the Supreme Court of the United States construing the Utah Statute, which is similar to ours.

Sec. 2309, *Revised Code of Arizona,* 1928 (App. p. iv) provides that a deed intended as a mortgage shall be construed as a mortgage, and for that reason a mortgage, though in the form of a warranty deed, is not constructive notice of mortgage in Arizona unless recorded in a book separate and apart from those in which deeds or other conveyances are recorded.

In the case of *Drake v. Reggel,* (Utah) 37 Pac. 583, the Court uses the following language:

> "That a deed recorded in the mortgage record and conversely a mortgage recorded in a deed record, is

> not constructive notice, has been frequently decided and rests on the reasonable presumption that an intending purchaser will not look in such a book for such an instrument. *Neslin v. Wells,* 104 U. S. 428; *Luch's Appeal,* 44 Penn. State 519; *Colomer v. Morgan,* 13 La. Ann. 202."

On page 513 of *Vol.* 14 *American Decisions* there is a note to the case of *James v. Morey,* 2 Cow. (N. Y.) 246; 14 A. D. 475, in which are collated numerous authorities to the effect that

> "an instrument must be recorded according to its real, rather than its apparent character. Therefore it is said that a deed absolute upon its face, but intended as a mortgage, does not impart notice to subsequent purchasers if recorded in the book of deeds."

and in this case (*James v. Morey*), the court used the following language:

> "Recording of an absolute deed when intended as a mortgage must be in the book of mortgages, or it will not impart notice."

Where the index is an essential part of a record, it is of course essential that record of the deed should appear in the mortgage index. This, however, is not the rule in states where it is not required that an index be kept in a particular form.

Section 2312, *Revised Code of Arizona*, 1928 (*Sec.* 4145, *R. S.* '13), reads as follows:

> "Deeds of trust of real or personal property may be executed as security for the performance of contracts and shall be considered and foreclosed as mortgages or chattel mortgages."

Deeds of trust are recorded in books of mortgages which, of course, is the proper place for them to be recorded. This practice is an interpretation of the statute that has been the rule in Arizona at least since the year 1901. This statute, like all others of Arizona, is to be liberally interpreted for the purposes for which it was enacted. It is in accordance with the plain principles of justice that creditors should be protected from secret claims and liens. We know of no case where the language of Chief Justice Marshall in the case of *Bayley v. Greenleaf et al*, 5 L. Ed. 393, 7 Wheat. 46, is more applicable (Referring to the claim that a vendor's lien was superior to the claims of creditors):

> "In the United States the claims of creditors stand on high ground. There is not, perhaps a state in the Union, the laws of which do not make all conveyances not recorded, and all secret trusts, void as to creditors, as well as subsequent purchaser without notice. To support the secret lien of the vendor against a creditor who is a mortgagee, would be to counteract the spirit of these laws."

Where a deed absolute is given and a defeasance taken back, it is necessary that the defeasance be recorded in the book of mortgages or other book provided for the

record of liens, for the record of the deed, standing alone, is not constructive notice of any lien or mortgage.

Manufacturers & Merchants Bank v. Bank of Penn., 42 A. D. 240;

Stephen v. Sherod, (Tex.) 55 A. D. 776;

Friedley v. Hamilton, 17 A. D. 638.

It is apparent, therefore, that the appellants' attempt to torture the meaning of the tdeed from Barringer to the Phoenix Title & Trust Company into a deed of trust to secure payment of a debt must fail, for even if it were such a deed of trust it would, under the statutes of Arizona, be a mortgage and would be void as to the appellees herein since it was not recorded in the Mortgage book or in the book entitled "Miscellaneous".

Possession Is Equivalent to Record; Therefore the Instrument Upon Which Appellant Relies Is Void as to the Trustee in Bankruptcy.

The bankrupt's predecessors in interest, the bankrupt corporation, and the Trustee in Bankruptcy were all in successive order in possession of the lands that are the subject of this litigation. In Arizona possession is equivalent to record so far as concerns rights under *Section* 969, *Revised Code of Arizona,* 1928 (App. p. iii).

Counsel for appellants has suggested that said *Section* 969 is not available to the trustee in bankruptcy and the

other appellees herein for the reason that the bankrupt corporation held under an equitable title and that the lands were not subject to levy and sale for that reason. This contention has been decided adversely to appellants by the Supereme Court of Arizona. The issue was squarely raised in the case of *Keith v. Aztec Land & Cattle Co.*, 21 Ariz. 634, 193 Pac. 535, as to whether the defendants if in possession had a right to have plaintiff's lease and subsequent purchase contract declared void under the provisions of paragraphs 2066 and 2080, *Civil Code of Arizona,* 1913. The court held that the defendants being in possession, the plaintiff's unrecorded lease antedating defendant's purchase contract was void as to the defendant.

This identical question was also before the Supreme Court of Arizona in the case of *Cady v. Purser,* supra, and the court there said:

> "It is immaterial that the title of the corporation did not appear of record in the recorder's office. The provisions of the recording act are not limited to titles which appear of record, but are applicable as well to those which exist by virtue of prescription. The possession of the land by the corporation at the time of the sheriff's sale was prima facie evidence of its title."

The case of *Vreeland v. Claflin,* 24 N. J. Eq. 313, is also a case that is directly in point.

Appellant Barringer's Conveyance to Phoenix Title & Trust Co. Is Fraudulent as to Creditors.

That the conveyance to the Phoenix Title & Trust Company, the execution of the promissory note, and so-called Declaration of Trust by Tunney, had the effect of concealing the true state of the title from the creditors who have filed claims in the bankruptcy proceedings, is shown by the results. That such was the intent of the purchasers clearly appears from the use of Tunney as a dummy to avoid personal liability and the payment to him of $20.00 to so act (T. R. 702).

That each of the appellants connived at such fraudulent conveyance also clearly appears from their acts, especially when they withheld from the record the instrument which evidenced the Barringer lien and failed to give notice to purchasers and inquiring creditors.

The nature of the business was such that appellants must have known that the bankrupt corporation was engaged in or about to engage in a business or transaction that would result in the creation of debts for which the creditors of the predecessors in interest of the bankrupt would have a right to collect by proceedings against the property.

Appellants knew that by their failure to have the instrument, which was in legal effect an equitable mortgage, remain unacknowledged, they thereby prevented any notice from the records to prospective purchasers and creditors of any alleged claim of appellee Barringer to the

premises, and that the natural consequence of their acts would be to hinder and delay these creditors in the collection of their debts by reason of the concealment of the true state of the title.

The subsequent events disclose that the predecessors in interest of the bankrupt had an unreasonably small capital with which to carry on the business or transaction thus contemplated and engaged in; therefore, the conveyance was fraudulent as to creditors and other persons who became creditors during the continuance of such business under the laws of Arizona, particularly the Uniform Fraudulent Conveyance Act as the same appears in Chapter 131, Session Laws of Arizona, 1919 (App. p. i).

The 1928 Code did not go into effect until July 1, 1929, but the Uniform Fraudulent Conveyance Act is carried forward into said Code as Sections 1525-1529.

Judge Story, in *Wood v. United States,* 10 L. Ed. 987, 16 Peters 342, says:

> "The other objection has as little foundation, for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party as fraud would be in the last importation from prior fraudulent importations. In each case the *quo animo* is the question, and the presumption of fraudulent intention may equally arise and equally prevail."

The very purpose of the Legislature in Arizona in the adoption of the Uniform Fraudulent Conveyance Act was

to prevent such transactions as is shown in the record in the present case, and to prevent the defrauding of creditors by collusion between grantor and grantee, one to escape personal liability, the other to obtain an unjust advantage through the transaction.

Sec. 70a, Subd. 4 of the Bankruptcy Act (Title 11, Ch. 7, Sec. 110, U. S. Code 1928) provides that ownership and title to property conveyed in fraud of creditors passes to the bankrupt's trustee in bankruptcy.

II

Appellants Are Estopped to Assert a Lien Against Appellees.

The conduct upon which appellee relies to establish an estoppel against appellants is shown by the record to be as follows:

The appellants knew that the purchasers of said property, bankrupt's predecessors in interest, intended to and were required by their contract to make extensive improvements on the property (T. R. 429-432). The contract provided that the sale price of the various lots should aggregate the sum of $250,000 (T. R. 435). In order to give the property any such value there would have to be very expensive improvements thereon in the nature of paving, electric light facilities, wells, water system and various other improvements. It also appears from the evi-

dence that the appellants and each of them, knew that these improvements were being made upon the property.

It also appears from the testimony of Mr. Lieber (T. R. 313, 637-647) that when he was contemplating extending credit to the bankrupt's predecessor in interest in the amount of approximately $1200.00 he went to the Phoenix Title & Trust Company, the trustee named in the deed, and inquired as to the financial status and condition of Owens, Dinmore and Mills. Instead of this appellant giving him the information that it was in duty bound to give, namely, that the appellant Barringer was claiming a lien upon the whole of the property for the amount of approximately $85,000.00, they assured him that it was safe for him to extend credit to these people.

The evidence conclusively shows that credit by those creditors who have filed their claims in the bankruptcy proceeding was extended to the predecessors in interest of the bankrupt for the improvements made upon the lands in question.

Appellants permitted signs upon the property indicating ownership of those in possession thereof and signs upon the property that appellant Phoenix Title & Trust Company would guarantee the title thereof (T. R. 646).

As appellants contend that Phoenix Title & Trust Company was in possession of the property, certainly they are charged with notice of the signs that were erected thereon.

That appellants knowingly permitted the bankrupt and its predecessors in interest to take and retain possession of the property as owners and to hold themselves out as such to the public in general and numerous creditors in particular appears first in the contract giving them that right (T. R. 423-452), in the testimony of Mr. Grose (T. R. 543-561), the testimony of Mr. Lieber (T. R. 637-647) and the testimony of various other witnesses appearing in Transcript of Record pages 633-651).

As appellant withheld from the record the instrument containing the purported lien and thus committed a fraud upon creditors, and knowingly permitted extensive improvements upon the property to the extent of $90,000.00 without a disclosure of either claim of lien thereto, or ownership thereof, they were guilty of a fraud which prevents them from asserting any title to the property unless perhaps they might do so by a re-imbursement to the bankrupt estate of the amount that had been appropriated for such improvements approximating the sum of $90,000.00.

No reason is given in appellants' brief as to why this instrument was withheld from the record. They are of course charged with the knowledge of the law that by withholding the same from the record they render it invalid as against the appellees herein.

That the withholding from the record of the instrument purporting to create the lien is a fraud upon the creditors which estops the alleged lienholder from asserting a lien, is clearly established by the Federal court in the case of

Ash v. Honig, 62 Fed. (2) 793 (2 C. C. A.); and the principle is recognized by the Supreme Court of the United States in *Kirk v. Hamilton,* 102 U. S. 68; 26 L. ed. 79, and in *Dickerson v. Cosgrove,* 100 U. S. 578; 25 L. ed. 618.

The conduct of Mr. Lieber in making the inquiry and the conduct of the Phoenix Title & Trust Company when Mr. Lieber went to their office and made his inquiries as to the responsibility of the owner of the property (T. R. 637-647) bring this case clearly within the rule laid down in *Ash v. Honig,* supra, which was a bankruptcy case and with practically the same issues involved, and where the conduct of the cerditors was very similar to that of Mr. Lieber in this case, and where the court held that by reason of conduct of the creditors an estoppel was created in favor of the mortgagee (See App. p. ix, x).

That the Phoenix Title & Trust Co., trustee, was the proper person of whom inquiry should be made is apparent from the opinion of Judge Gilbert in the case of *Sternfels v. Watson,* 139 Fed. 505, rendered prior to the time he became one of the Justices of the Ninth Circuit Court of Appeals. In this case the party charged with inquiry had made his inquiries of other persons, but had not made any inquiry of the party named in the deed as "trustee", and Judge Gilbert in his opinion says:

> "He, of all persons whose names appeared on the records, best knew the facts, and the contingency that he might have denied the trust was no excuse for failure to make inquiry of him."

Estoppel in Pais Need Not Be Pleaded.

This appellee in his petition before the Referee set up facts that constituted an estoppel of record, namely the fact that the instrument relied upon was void for want of record and other reasons (T. R. 171-......). No further pleading of estoppel was necessary under the facts of this case. In the first place it is governed by Federal Equity rules and no reply is required under those rules to an answer where no counterclaim is set up. There was no counterclaim in the present instance. There was only the attempt to establish the validity of a lien when invalidity of the lien was asserted in the petition (T. R. 189-198). Therefore the issue was made by the petition and answer. When estoppel arises from attempts of a defendant to prove title to lands in possession of the petitioner, estoppel does not have to be pleaded. 21 C. J., page 1246, Sec. 256. Nor where it is shown by the evidence. 21 C. J., page 1246, Sec. 255. See also Sec. 250-251, pp. 1244-1245 when there is no opportunity to plead or reply is not required.

There is no requirement that estoppel be pleaded where there is no opportunity to plead it.

Shelton v. Southern Ry. Co., 255 Fed. 182.

In the instant case appellants failed to object to the evidence establishing estoppel until after several witnessed had testified (T. R. 543-562). Such conduct waives any objection to a failure to plead estoppel under the provisions of this Court.

Lusk v. Bush, 199 Fed. 369 (9 C. C. A.).

It would certainly be the grossest injustice to creditors, if, after making the deed to the property for the benefit of the purchasers, putting them in possession and allowing them to go ahead and incur debts, and make improvements on the property of a value in excess of $90,000.00, much of which was obtained upon credit, she would be permitted to come into court and claim a secret ownership of the land, with no record retaining title in her and no notice of any kind to creditors that she was theretofore claiming a secret title or lien. Such conduct would certainly be fraudulent and work an estoppel even in the absence of as strong statutes (hereinbefore cited) as we have for the protection of creditors. One thing stands out above all other in this case, and that is that there was a deliberate attempt to evade the statutes of Arizona designed for the protection of creditors.

We submit that upon this ground alone the order of the United States Court should be affirmed on this appeal.

Appellants in this case have ignored the plainest maxims of equity. They come into a court of equity, but they do not comply with the maxim that "he who seeks equity must do equity" or "he that comes into equity must come with clean hands". The evidence before this Court clearly shows that they are seeking now to take away from innocent purchasers and the creditors of the bankrupt property which they valued in excess of $250,000.00, and on which $90,000.00 of money that would otherwise be subject to the rights of the creditors was spent to give it

this value. The testimony shows that the improvements added this value to the property, that their contract demanded as a term thereof that this money be spent upon this property, and yet they now seek to deprive the people who furnished the money for these improvements from *sharing equally with them* in the proceeds of a sale of that property, though this appellee offered to have the claim allowed as an unsecured claim. They now demand instead that the property be surrendered to them.

We submit that in equity and good conscience they should not have any advantage over those whose money made the property valuable.

III

Appellants have failed to state a case requiring a reversal of the order of the District Court, or any consideration by this Court on appeal, for the reason the Assignments of Error relied upon by appellants fail to advise the Court of the questions it is called upon to decide without going beyond the assignments themselves, and present no question for review on this appeal.

Appellants' Assignments of Errors Nos. IV, V, XIII, XIV and XV (Appellants' Brief, pages 13, 13, 26, 25 and 25, respectively), are based upon findings of the Referee, the errors complained of not being pointed out with particularity as required by Rule 11 of this Court, or the principles of equity governing assignments of error, and

do not point out wherein the order of the District Court appealed from, as distinguished from the findings of the Referee, is erroneous in whole or in part.

> *Andrews v. National Foundry & Machine Works,* 46 U. S. Appeals, 281; 36 L. R. A. 139.

Assignment of Error No. XVII (Appellants' Brief p. 32) is directed to the contention that the "whole bankruptcy proceedings were fraudulent and void". This assignment has no foundation in any allegation of error in appellants' petition to review the order of the Referee and further the same is a collateral attack upon the order of adjudication made by the District Court, such attack now being made several years after the adjudication which was entered on the 28th day of Oct., 1930, and further no such allegation was made in the answers of either of these appellants (T. R. 323-337 and 189-198) to this appellee's petition to marshal liens, and should therefore not be considered upon this appeal.

> *Fairbanks Steam Shovel Co. v. Wills,* 240 U. S. 642; 60 L. Ed. 841;
>
> *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656; 23 L. Ed. 336;
>
> *In re Fox West Coast Theaters*, 88 Fed. (2) 212.

Assignment of Error No. V (Appellants' Brief p. 13) is directed to an alleged finding of the Referee that "said ownership and title of appellant Phoenix Title & Trust Company is void as to the trustee in bankruptcy and the creditors of the bankrupt, for the *insufficient reason* that a

certain declaration of trust in which it agreed to hold said property entitled thereto as security for said indebtedness of Thomas J. Tunney, was not recorded."

The record will disclose no such finding by the Referee, and further an assignment of error could not be based upon the ground that the court made its rulings for an "insufficient reason".

Andrews v. National Foundry & Machine Works, supra.

Assignment of Error No. IV (Appellants' Brief p. 13) is not only based upon an alleged finding of the Referee, as above stated, but rests its allegation upon the evidence "as shown by said reporter's transcript", whereas the reporter's transcript is no part of the record, either in the court below or on this appeal, and therefore cannot be the foundation for any assignment of error.

Crim et al v. Woodford, 136 Fed. 34 (4 C. C. A.);

In re Taft, 133 Fed. 511 (6 C. C. A.);

In re Hays, 181 Fed. 674 (6 C. C. A.).

Assignment of Error No. XV (Appellants' Brief p 25) is not only directed to a finding of fact of the Referee, but is also based upon the assumption that the finding is "eroneous in that said finding was without support in the evidence before the Referee". It is therefore totally insufficient under Rule 11 of this Court, for it is nowhere pointed out in what particulars the "evidence" fails to sustain the finding of fact mentioned.

Assignment of Error No. XVIII (Appellants' Brief p. 25) is directed to an alleged error that the Referee permitted witnesses to testify to certain evidence. It does not comply with Rule 11 of this Court in that it does not quote the grounds urged at the trial for the objection and exception taken and the full substance of the evidence admitted. *Further such assignment was not assigned as a ground of error in appellants' petition to review the order of the Referee.*

Assignment of Error No. XIV (Appellants' Brief p. 25) is too general to raise any question for a review by this court, and is not directed to any error of the District Court. It is therefore totally insufficient. Furthermore, we have pointed out on pages 25-27 of this brief the evidence which fully supports the finding of the referee.

An examination of these assignments of error discloses that no complaint is made therein of any error in the order, nor is it pointed out wherein it should be modified or why it should be reversed. It is nowhere pointed out wherein the District Court erred in its rulings. If the rule applicable to a Master in Chancery is also applicable to a Referee in Bankruptcy, then none of the assignments state the exception to the report of the Referee, the ruling of the court thereon, the exception to the report, and the action of the court upon it.

What it takes to constitute a good assignment of error is pointed out in Rule 11 of this Court which only ampli-

fies and makes clear the practice governing appeals in equity cases which have been in force for many years.

Rule 11 provides:

> "In equity cases the assignment shall state, as particularly as may be, in what the findings or decree are alleged to be erroneous. When the error alleged is to a ruling upon the report of a master, the assignment shall state the exception to the report and the action of the court upon it."

In *Andrews v. National Foundry Machine Works,* supra, the court says:

> "The specifications of error in a case brought up by appeal should not be that the evidence shows this or that, but that in this or that particular, separately stated, the decree is erroneous. *McFarlane v. Golling,* 46 U. S. App. 141, 70 Fed. Rep. 23."

This Court has also, in the case of *Mutual Life Insurance Co. of New York v. Wells Fargo Bank & Union Trust Co.,* 86 Fed. (2) 585, a law case, pointed out requirements as to assignments of error which we believe to be applicable to equity and applicable to assignments of error in general.

Appellant Has Failed to Make Out a Case Calling for a Reversal of the Order of the District Court.

Even had the assignments of error relied upon by appellants been sufficient to invoke the consideration of this

appeal by this Court, the appellants in their brief have failed to make out a case calling for the reversal of the order of the District Court.

On page 13 of their brief under Point I, appellants speak of the deed to the Phoenix Title & Trust Company as a "deed of trust". If by that they mean a deed of trust in the usual sense, to secure a debt, there is nothing in the deed itself to indicate such a purpose, nor was it executed by the debtor. So under no circumstances could the instrument itself be construed as such. Moreover under the statutes of Arizona such deeds are construed as mortgages and are void as against creditors and bona fide purchasers, unless recorded in a book separate and apart from deeds. This we have heretofore discussed in this brief.

The statement in appellants' brief that the title of the trustee in bankruptcy comes as a mere statute of succession is erroneous. Ever since the amendment of 1910, the title of the trustee has been three-fold as pointed out in *Remington on Bankruptcy,* supra. We have heretofore discussed this in our brief and have also cited cases thereon.

Moreover, as we have heretofore pointed out, the trustee upon adjudication becomes as much the owner of the property as if he held it by the deed of a sheriff or master in chancery.

The contention of appellants that the bankrupt had a mere executory right to acquire property on performance

of condition is not sustained by the facts or by the evidence introduced. The cases cited by appellants do not bear out their contention.

Hull v. Farmers Loan & Trust Co. (1917), 245 U. S. 312, cited by appellants, is a case of spendthrift trust and conditional gift, and therefore for that reason the property described therein did not pass to the trustee in bankruptcy, the bankrupt having no interest whatsoever therein.

The statement on page 15 of appellants' brief that the bankrupt had no title and there was no resulting trust in favor of the purchasers of the property is likewise contrary to the holdings of all courts, the rule being uniform that a resulting trust arises in favor of purchasers who furnish the consideration, although for convenience, the conveyances are taken in the name of another. As we have heretofore pointed out in this case, the full consideration was paid by the purchasers by paying $20,000.00 in cash and giving a note secured by an equitable mortgage good as between the parties in the sum of $85,000.00, making the full consideration of the purchase price. The case which appellants cite on page 16 from this court, *Walrath v. Roberts* (9 C. C. A. 1928), 23 Fed. (2) 32, not only fails to sustain their contention but is directly contrary to that contention, as that case holds that the grantor in a deed cannot set up a resulting trust in his favor. We have fully treated this in an earlier portion of this brief. Nor does the case of *Stelling v. Stelling,* (Ill. 1926) 153 N. E. 718, sustain appellants' contention.

The statement on page 16 of appellants' brief that the bankrupt had a mere executory right is also without foundation. The entire consideration having been paid by the predecessors in interest of the bankrupt and the entire beneficial ownership being vested in them by an equitable title, the same passed to the trustee in bankruptcy as completely as if it had been sold and conveyed by a sheriff's deed, or that of a master in chancery, and under the decisions in Arizona, as we have heretofore pointed out, property held under an equitable title is subject to execution, levy and sale in Arizona.

Appellants contend that the interest of the trustee in bankruptcy is personal property by virtue of Section 13 of the instrument under which they claim a lien. As we have pointed out, in Arizona the purchaser becomes the owner of the land and the interest of the vendor, even when he reserves title, is only personal property. The law cannot be changed by a mere declaration of the parties contained in an instrument executed by them.

Appellants cite two cases from California, *Craven v. Dominguez Estate Co.* (Cal. 1925) 237 Pac. 821, and *Smith v. Bank of America etc. Assn.* (Cal. 1936) 57 Pac. (2) 1363, to sustain his contention that appellant Phoenix Title & Trust Company had full title. These cases are under a particular statute in California, Section 863, reading as follows:

> "*Trustees of express trusts to have whole estate*: Except as hereinafter otherwise provided, every ex-

> press trust in real property, valid as such in its creation, vests the whole estate in the trustee, subject only to the execution of the trust. The beneficiaries take no estate of interest in the property, but may enforce the performance of the trust."

This section has no counterpart in Arizona and is contrary to the laws of Arizona, which, as we have pointed out, adopts the equitable doctrine that the purchaser becomes the owner of the land. For this reason the statement made by appellants on page 18 of their brief that: "the primary right of the beneficiary in the instant case was to compel Trust Company to sell and convey lots at specified prices" is erroneous. The beneficiary had all the rights to the property. The vendor had only such rights as she obtained from the instrument under which she claims a lien, and this, as we have heretofore pointed out, even if construed most favorably to her is only a contract to give a lien or an equitable mortgage.

The statement on pages 18 and 19 of appellants brief that bankrupt's judgment creditor could not have reached the real estate involved in this litigation is directly contrary to the holding of the Supreme Court of Arizona in the cases of *Oliver v. Dougherty,* supra and *Jarvis v. Chanslor & Lyon Co.,* supra, which we have heretofore cited and where the issue was clearly made. The cases cited by appellants on page 19 do not bear out their contention at all. *Costello v. Friedman* (Ariz. 1903) 71 Pac. 935, merely held that they were not entitled to specific performance, unless they complied with the terms of their contract. The

question of a lien void for want of record and the rights of a trustee in bankruptcy were not involved. The case of *Bennett v. U. S. Land etc. Co.* (Ariz. 1914) 141 Pac. 717, is a case where the defendants contended that the judgment of foreclosure and subsequent sale and deed were not effective as to them because they were not served in the case, and the court merely pointed out how they could protect their rights. Nor does the case of *Snow v. Kennedy* (Ariz. 1930) 286 Pac. 930 assist appellants in any manner.

We are unable to see any relevancy in the argument presented by appellants on pages 20-22 of their brief to the facts of this case.

Appellants contend (pp. 22-25 of Brief) that *Section* 969 *of the Revised Code of Arizona* 1928 does not protect a purchaser in possession. This contention however, has been settled contrary to the position of appellants in the case of *Keith vs. Aztec Land* & *Cattle Co.*, supra, where the point was directly in issue as we have heretofore pointed out.

The Texas cases cited by appellants on page 23 of their brief are not in point for a number of reasons. First, they are not under the particular statutes that is under consideration here and they refer to a different form of judgment. Moreover as pointed out in these cases the party had no real interest in the property. There is in Texas a form of statutory judgment which has no counterpart in Arizona. Once a judgment is docketed in Ari-

zona it becomes a lien upon the real property of the judgment debtor. *Revised Code of Arizona,* 1928, *Section* 2017. (App. p. iii, iv).

We have set up in our brief affirmatively, the facts upon which we rest our contentions that appellants are estopped from claiming any interest in the property, with the cases to support them. Likewise we have disposed of the theory of appellant that it was necessary for this appellee to plead estoppel more particularly than he has done, or to plead it at all under the circumstances of the particular case.

We think the evidence as we have pointed out in our brief completely establishes estoppel in favor of the cerditors of the bankrupt and of innocent purchasers from the bankrupt's predecessors in interest, and as a matter of course that estoppel works in behalf of the trustee in bankruptcy who is, after all, the representative of the creditors and his action is for their benefit.

The statement of appellants as to the testimony of witnesses Grose, Norman, Whitney and Lieber (pp. 27-31) is so inaccurate and misleading that we shall not attempt to point out its defects in this brief, but we refer this Honorable Court to our argument under out contention No. II on estoppel, pages 57-59 herein, wherein we point out with particularity the evidence upon which we rely to sustain our claim of estoppel.

The statement on pages 31 and 32 of appellants' brief that there was no testimony to show that Owens, Dinmore and Mills exercised dominion over the tract is so

contrary to the record that we do not feel that it requires any denial in the face of the record. This contention is apparently based upon the fact that a large portion of the $90,000.00 spent upon the property was for street improvements. We call attention to the fact that the property purchased and upon which appellant Barringer claims a lien included the streets as well. Nor do we see how it could be contended that improvements upon the streets by way of paving did not add to the value of the lots in front of which the paving was laid. Moreover the testimony clearly shows that there was a sinking of a well upon the property and many other acts of possession and dominion exercised by the bankrupt's predecessor in interest, the bankrupt and the trustee in bankruptcy, including the harvesting of a crop of hay upon the premises and the installation of a water works system.

It is well settled by the decision of the Supreme Court of the United States that title can pass by estoppel. The title of the trustee in bankruptcy does not rest on estoppel alone; he has the rights of a lienholding creditor and he has the title that passed to him by operation of law upon the filing of the petition in bankruptcy. He has possession of the property and this alone creates a presumption of ownership.

The remaining portion of appellants' brief is devoted to a collateral attack upon the bankruptcy proceedings. We do not deem that attack worthy of further notice than we have already in this brief given upon this point.

This Court Cannot Consider Evidence on This Appeal Which Is Confined to Questions of Law.

Appellant Barringer filed a proof of debt in the bankruptcy proceeding, claiming as an incident to her debt a lien upon the lands of the bankrupt (T. R. 577-583). She thereby instituted a proceeding in bankruptcy under the rule laid down in *Coder v. Arts,* 213 U. S. 223, 53 L. ed. 772.

Had the record shown that an order had been made rejecting her claim, the order would have been appealable under *Section* 25*a of the Bankruptcy Act* and both law and evidence could have been reviewed. The record does not show that the claim was rejected. Had the record shown that an order had been made allowing her claim, but rejecting her alleged lien as an incident thereto, the order would have been reviewable under *Section* 25*a* and both matters of law and evidence could have been considered. The record does not show any such action.

Therefore this appeal not being a controversy arising in the course of the bankruptcy proceedings, nor an appeal from any order allowing or rejecting a claim of $500.00 or more, as provided by said *Section* 25*a,* the evidence cannot be considered on review.

The order of the District Court might still be reviewed on an allowance of appeal by this Honorable Court under the rule laid down in *Taylor v. Voss,* 271 U. S. 176, 70 L. ed. 889, but the evidence cannot be reviewed and as appellant would have had to introduce evidence to establish

her alleged lien, it follows that the order of the District Court must be affirmed, no error of law appearing on the record.

The rule laid down in *Coder v. Arts,* supra, as to what constitutes a proceeding in bankruptcy or a controversy arising in a bankruptcy proceedings is particularly applicable to the facts in the instant case. (App. p. v).

The evidence cannot be reviewed on this appeal for the further reason that the statement of evidence was not settled by the trial judge. T. R. 681-682). Nor was this appellee or the other appellees who are indispensible parties to this appeal offorded an opportunity for a hearing on the statement of evidence, it having been settled without notice to any of the appellees herein and without a hearing thereon.

Equity Rule 46 places certain duties on the trial judge which clearly show that the provisions of Equity Rule 75 are directed to the trial judge or trial court when the court consists of more than one judge.

Rule 46 provides:

> "When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it is offered, the objections made, the ruling and the exception."

The petition for appeal was not filed within thirty days after the District Court made its order affirming the order of the Referee and therefore the appeal was not filed within the time permitted by the Bankruptcy Act. This matter is fully treated under our Motion to Dismiss filed herein, which we respectfully ask this Court to consider in connection with this point.

We wish further to call the court's attention to the fact that no error is assigned to any ruling of the Referee or Judge upon the "proof of debt" filed by appellant Barringer, the Trustee in Bankruptcy having filed objections thereto, nor does the petition for review allege any such error, and as the asserted lien could only exist as an incident to a proven debt, no basis exists for this appeal.

The contention of this appellee is fully sustained by the following cases in each of which judgment was rendered in favor of a trustee in bankruptcy under issues and statutes practically identical with those involved in the instate case.

Hams v. Marshall, 43 Fed. (2) 703; C. C. A. 2nd Cir. July, 1930;

(Certiorari denied Oct. 27, 1930); 75 L. ed. 778.

Cooper Grocery Co. v. Park (5 C. C. A.) 218 Fed. 42.

In re Oswegatchie Chemicals Products Corp. 279 Fed. 547 (C. C. A. 2nd) (Certiorari denied, 66 Law ed.)

Foerstner v. Citizens' Savings & Trust Co., 186 Fed. 1, C. C. A. 6th Cir. (1911).

Pacific State Bank v. Coates, 205 Fed. 618 (9 C. C. A.)

Fuller v. Atlanta Nat'l Bank, 254 Fed. 278 (5 C. C. A. Ga.) 13.

We respectfully submit that appellants having failed to make out a case calling for a reversal of the order of the District Court, and this appellee having pointed out the reasons why the order of the District Court should be affirmed, that the judgment of this court should be that the order of the District Court be affirmed.

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THOMAS W. NEALON,

....,

ALICE M. BIRDSALL,

Attorneys for Appellee, George E. Lilley, Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a Corporation.

APPENDIX

STATUTES OF ARIZONA:

Chapter 131, Session Laws of Arizona 1919. AN ACT CONCERNING FRAUDULENT CONVEYANCES AND TO MAKE UNIFORM THE LAW RELATING THERETO.

* * *

Section 4. (Conveyance by Insolvent). Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

Section 5. (Conveyance by Persons in Business) Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

Section 6. (Conveyances by a Person about to Incur Debts) Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

SEC. 849. MUST PROCURE AND KEEP BOOKS; INSTRUMENTS TO BE RECORDED. The recorder shall procure such books for records as the business of his office requires. * * * He shall record separately, in typewriting, or in a fair and legible hand, in large and well-bound separate record books, deeds, grants, transfers, mortgages of, or instruments affecting real property * * * and such other writings as are by law required or permitted to be recorded. (Sec. 1134-5, R. S. '01; 1, Ch. 56, L. '09; 2587-8, 2590, R. S. '13, cons. & rev.)

Sec. 850. ENUMERATION OF INDICES TO BE KEPT. Every recorder shall keep: 1. an index of deeds, grants, and transfers, labeled "grantors", each page divided into four columns, headed respectively: "Name of grantors", "names of grantees", "dates of deeds, grants or transfers", and "where recorded"; 2. an index of deeds, labeled "grantees", each page divided into four columns, headed respectively: "Names of grantees", "names of grantors", "dates of deeds, grants or transfers", and "where recorded"; 3. two indices of mortgages, labeled respectively: "mortgages of real property", "mortgages of personal property", with the pages thereof divided into five columns, headed respectively: "names of mortgagors", "names of mortgagees", "dates of mortgages", "where recorded", "when discharged"; 4. two indices of "mortgages", labeled respectively, "mortgages of real property", "mortgages of personal property," with the pages thereof divided into five columns, headed respectively: "names of mortgagees",, "names of mortgagors", "dates of mortgages", "where recorded", "when discharged", * * * (Sec. 1136, R. S. '01; 2589, R. S. '13)

"Sec. 969. UNRECORDED INSTRUMENTS VOID AS AGAINST PURCHASERS AND CREDITORS: All bargains, sales and other conveyances whatever, of any lands, tenements, and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, *and all deeds of trust and mortgages whatsoever,* which shall hereafter be made and executed, *shall be void as to all creditors and* subsequent purchasers for valuable consideration without notice, unless they are acknowledged and filed with the recorder to *be recorded, as required by law, or where record is not required,* deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all *subsequent purchasers, with notice thereof,* or without valuable consideration, shall nevertheless be valid, and binding. (Sec. 749, R. S. '01; 2080, R. S. '13)

"Sec. 974. ACTION TO CORRECT ACKNOWLEDGMENT. When the acknowledgment was properly made, but defectively certified, any party interested may have an action in the superior court to obtain a judgment correcting the certificate. (Sec. 757, R. S. '01; 2088, R. S. '13 rev.)"

Sec. 2017. LIEN OF JUDGMENT; NOT TO AFFECT DECLARATION OF HOMESTEAD. From the time of its docketing a judgment becomes a lien for a period of five years from the date of its rendition upon all the real property of the judgment debtor, except such as is or may be exempt from execution, including the interest in

the homestead, in the county where the same is docketed, whether the said property is then owned by said judgment debtor or is later acquired. * * * (Sec. 2883, R. S. '01; mod., 3633, R. S. '13 rev.)

"Sec. 2309. TRANSFER AS SECURITY A MORTGAGE; PLEDGE; PATROL EVIDENCE. Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except of personal property when accompanied by an actual change of possession, which is to be deemed a pledge. The fact that the transfer was made subject to defeasance on a condition, may, to show such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument. (Secs. 4095-6, R. S. '13, cons.)

U. S. CODE

"The trustee of the estate of a bankrupt, upon his appointment and qualification and his successor or successors, if he shall have one or more, upon his or their appointment and qualification shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors. * * *" Section 70a of Bankruptcy Act, Sec. 110, Title 11, Ch. 5, U. S. Code 1928.

OPINIONS, MATTER QUOTED FROM

"We are thus brought to the determination of the question, was the proceeding instituted by Arts a controversy arising in bankruptcy proceedings, or did he institute a bankruptcy proceeding, properly speaking? * * * The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustees to be administered, described the mortgage as being the only security held by him for the payment of the debt, * * *

"He thus in effect presented to the trustee in bankruptcy a claim upon his notes, joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. * * * Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings.

Coder v. Arts, 213 U. S. 223; 53, L. ed. 772.

"The sole question presented for decision here is whether a grantor of real estate by absolute conveyance has an implied equitable lien thereon for the unpaid purchase money. If such a lien arises at all, it must, on principle, prevail alike against the grantee himself and all subsequent purchasers with notice. The doctrine of the English

court of chancery, which recognizes and upholds such a lien, has been adopted in some of the states, rejected in some, and remains undecided or doubtful in others. There seems to have been no settled adjudication of the question in this territory, and we therefore feel at liberty to determine it as one of first impression. A considerable diversity of opinion exists concerning the origin of the vendor's lien. It has been accounted for as a trust, as an equitable mortgage, as arising from natural equity, and as a contrivance of the chancellors to evade the unjust rule of the early common law by which the land was free from the claims of simple contract-creditors * * *.

"It is opposed to the policy of our legislation, which aims to make the title to real estate as simple and easily understood as possible, and to facilitate its transfer and improvement by discouraging all secret or latent equities, and requiring conveyances and encumbrances thereof to be made matters of public record. Here, our attachment law readily permits a debt to become a lien before judgment, and debts generally are a lien upon the lands of decedents. The doctrine being thus repugnant to our registration law, ill-suited to our condition, and by no means essential to the interests of justice, we ought not to adopt it. * * *"

Baker v. Fleming, 6 Ariz. 418, 59 Pac. 110.

"The evidence shows that plaintiff Morse's claims on the lands in question are subordinate to defendants'. It is true he had a lease on them antedating defendants' contract of purchase, but it was not recorded until some time after the date of defendants' contract. The defendants,

therefore, had no constructive notice of Morse's lease, and as to them it was void. Paragraph 2066-2080, Civ. Code, 1913. They obtained actual notice of his lease some time after the date of their contract, and after they had taken possession. Morse had no improvements on the land, and was not on it or using it when defendants examined it in July, or at the time they took possession. Morse's contract of purchases is dated March 1, 1918, five months after the date of defendants' contract, and was entered into with full knowledge of defendants' equities."

Keith v. Aztec Land & Cattle Co., 21 Ariz. 634, 193 Pac. 535.

"Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession and is placed in the custody of the bankruptcy court * * * The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy * * * It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankruptcy estate. * * * Thus while valid liens existing at the time of commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation."

Isaacs v. Hobbs, 282 U. S. 734; 75 L. ed. 645.

"A deed by the owner of land, duly signed and acknowledged by him and delivered to the grantee, conveying the

land to the latter in fee simple, is one of the most solemn of civil acts. It is not a thing to be played with, or reclaimed at pleasure, as a hawk in falconry. It is not void on account of either want or failure of consideration; nor does want or failure of consideration raise a resulting trust.

"Unless there is some evidence of fraud or mistake, the recitals in the deed are conclusive upon the grantor, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance.

Tillaux v. Tillaux, 115 Cal. 663, 47 Pac. 691.

"In this case Oliver was in possession, and was enjoying an equitable title, *all of which was the subject of sale and levy;* and, when Ross bought under a levy and sale of that equitable interest, he acquired such an interest in the property and such a claim to the property as would support an action to quiet title. Whatever right, claim, or interest one has in property in Arizona is subject to levy and sale; and he who purchases has a right to be put into the same possession of the right, claim or title which the judgment debtor had therein.

Oliver had a leviable interest in the property, and when his creditor sold under execution his leviable interest, the purchaser acquired the same; and after he had done so he stood in the situation of one having or claiming an interest in real property. All the right, title, and interest of Oliver therein was gone; and whether, under the old common law, the purchaser acquired such an interest as would enable him to maintain ejectment is not before us for decision, but only whether his interest was of such a nature as would support the statutory action for quieting title."

Oliver v. Dougherty, 8 Ariz. 65, 68 Pac. 553.

"While in law a contract for the sale of land is in every particular executory, and produces no effect upon the respective estates and titles of the parties, until by the execution and delivery of a deed of conveyance the estate in the land passes to the vendee, equity views the situation from a very different standpoint. Though in some respects and for some purposes the contract is executory in equity as well as at law, so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed and as operating to transfer the estate from the vendor and to vest it in the vendee. One of the great foundation stones of equity is the maxim: 'Equity regards and treats as done what in good conscience ought to be done.' Applying this principle to the doctrine of specific performance, by the terms of a contract for sale the land ought to be conveyed to the vendee, and the purchase money ought to be transferred to the vendor. Equity regards it, therefore, as done; the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land, and, although the vendor remains owner of the legal estate, he holds it as a naked trustee for the vendee, to whom all the beneficial interest has passed." (Citing *Pomeroy, Specific Performance of Contracts* (3d ed.), par. 314.)

Strahan v. Haynes, 33 Ariz. 128; 262 Pac. 995.

"At bar it is undisputed that the improvements were made within the sight of the bankers and with what must have been certain knowledge on the part of the mortgagee. In these circumstances, the bank remained silent when it should have spoken. Failure to record the mortgage, to-

gether with the circumstance that the bank, *on inquiry from the appellants,* had full opportunity to disclose to them the true situation, is sufficient to create an equitable estoppel" (citing authorities.)

"Whatever may have been the intention of the bank regarding the mortgage, its use and recordation, the *failure to record has actually practiced deceit,* and the appellants remained unprotected while they improved the property on the assurance that the bank was financing the operation and that the property was free of indebtedness. As was said in *Manton v. Brooklyn & Flatbush Realty* Co., supra: *'The lienor who willfully or negligently keeps his lien off the docket "knows or ought to know that some one is relying upon his silence and will be injured by that silence'."* *Collier v. Miller,* 137 N. Y. 332, 33 N. E. 374. There is the duty to speak, a duty to give notice, which, if violated, creates an estoppel."

Ash v. Honig, 62 Fed. (2) 793 (2 C. C. A.)

"What, then is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account. * * *

"Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the

cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. *This giving the property as security for the payment of a debt is the very essence of a mortgage* which has no existence in a case of conditional sale."

Herryfords v. Davis, 26 L. ed. 160; 102 U. S. 235.